BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMMIE G. FOULK Claimant	)	
VS.	)	
	)	Docket No. 168,924
COLONIAL TERRACE Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

ON the 7th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated November 12, 1993, came on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Lawrence M. Gurney, of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, M. Doug Bell, of Coffeyville, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as specifically set forth in the her Award dated November 12, 1993.

STIPULATIONS

The stipulations set forth by the Administrative Law Judge in her Award dated November 12 1993, are hereby adopted by the Appeals Board for purposes of this order.

ISSUE

What is the nature and extent of claimant's resulting disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law.

The Appeals Board also adopts and incorporates into this Order the findings of fact set forth in the November 12, 1993 Award by the Administrative Law Judge to the extent they are not inconsistent with the findings and conclusions expressed herein.

From a personal injury by accident arising out of and in the course of her employment with the respondent the claimant sustained a five percent permanent partial general body disability.

The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

In the case at bar, the claimant has not met her burden of proving a loss of access to the labor market. Although the Appeals Board does find that the claimant sustained a permanent injury which resulted in some permanent limitations, those limitations were imposed in large part due to the subjective complaints of the claimant. The trier of fact does not find the testimony of the claimant to be credible in light of the video tape and other evidence taken as a whole which shows claimant capable of performing tasks beyond the restrictions imposed by Dr. Black and due to the claimant's unwillingness to attempt the accommodated job offered to her by the respondent. In addition, both Dr. Koprivica and Dr. Black recommended a course of treatment of work hardening but claimant declined to participate in work hardening.

K.S.A. 1992 Supp. 44-501(a) states in part:

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 1992 Supp. 44-508(g) states:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-510e(a) defines permanent partial general disability as:

> "...the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

K.S.A. 44-510e(a) requires a balancing of two factors; ability to perform work in the

open labor market and ability to earn comparable wages. These factors are considered in light of the employee's education, training, experience, and capacity for rehabilitation. The statue is silent as to how the percentage is to be computed. However, the statute does provide the following:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The ultimate decision concerning the nature and extent of the disability is for the trier of fact. As the Court decided in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991), it is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and others in making a determination on the issue of disability.

Claimant testified at the regular hearing by deposition on January 28, 1993, upon questioning by counsel for respondent as follows:

"Q. Can you mow your yard?

A. No.

Q. Have you mowed your yard since the accident?

A. No. My husband does that."

However, the video tape and still photographs taken by the investigator hired by respondent's insurance carrier on June 26, 1992, clearly show claimant walking, pushing and pulling the lawn mower, as well as stooping, bending, twisting, turning, reaching, carrying a gas container and picking up trash or debris in her yard.

At the time of the regular hearing, claimant had been working approximately three months, one and one-half hours a day, five days a week, cleaning a doctor's office. This work included wiping down counters, cleaning sinks, vacuuming, sweeping floors and in general doing all of the janitorial work for the doctor's office and reception areas. She did this work without assistance, working at her own pace. She testified that this work did not bother her symptoms and that she had no difficulty doing the job.

Claimant refused to attempt the dietary aide job offered to her by the respondent. Dr. Koprivica testified that in his opinion that job would be within the restrictions he imposed and that she should be able to do that work. The dietary aide job would also have been within the original restrictions imposed by Dr. Black which limited lifting to 20 pounds frequently and 50 pounds occasionally. Initially, he did not impose any restrictions for bending, stooping, twisting, squatting, kneeling or crawling. Likewise, there were no restrictions for ambulation, sitting/standing, reaching/grasping when he released her in May, 1992. However, when claimant returned in July, 1992, complaining that her nurse's aide work aggravated her symptoms, Dr. Black advised her not to do the nurse's aide work and modified her restrictions to no lifting over 25 pounds and no bending or stooping over two times per hour.

There was some disagreement between the testimony of claimant and that of Rosemary Standiferd, administrator of the respondent nursing home, as to whether or not the dietary aide job requirements would violate these modified restrictions imposed by Dr.

Black. But as claimant never attempted the job, this question was never fully answered. It is the opinion of the Appeals Board that in the absence of an effort by claimant to attempt the position offered we can only assume that the employer would have made a good faith effort to accommodate her physical restrictions, both those recommended by Dr. Koprivica and those by Dr. Black. Dr. Bartal did not consider any restrictions to be warranted and therefore did not impose any. Dr. Koprivica testified that the job description for a dietary aide appeared to fit within his restrictions. As to whether the dietary aide job fit within the modified restrictions imposed by Dr. Black it is interesting to note his deposition testimony on that subject where he states as follows:

> "Q. Okay. And what about a dietary aide, are you familiar with that?
>
> A. Somewhat, just from observation. That would not be a problem -- The problem gets to be at that point is bending down in the carts and, you know, if you're passing the hundred - hundred trays, picking a hundred trays up out of the cart and putting in rooms and putting back on again, it's kind of a repetitive bending movement because those carts are pretty low to the ground."

The nursing home administrator testified that the cook, not the dietary aide, puts the food trays on the cart. She further testified that they average only 48 residents at the home and that only those residents who are unable to feed themselves are brought their food on trays.

On the subject of his advising claimant not to return to her job as a nurse's aide, Dr. Black testified:

> "A. My main concern about lifting patients is that - is something she said, that she's concerned if she picks somebody up and has a sudden pain in her back that she might drop someone; and then when a patient says that, you really don't have any - any alternative. I mean you can't -- It's a chance you can't --"

It appears from Dr. Black's testimony that the claimant's reported concern for dropping a patient was a significant factor in his recommending claimant not return to the nurse's aide position. There was some suggestion upon questioning by respondent's counsel that the nurse's aide position could be accommodated to eliminate the tasks of lifting and moving patients. Dr. Black felt that claimant might be able to do the nurse's aide job with this accommodation provided she was not required to do a lot of bending and twisting of her back or very heavy lifting.

He also opined that the job of a medication aide would be satisfactory and agreed that pushing a lawn mower would be outside his restrictions as modified.

Based upon the claimant's demonstrated ability to perform tasks outside the modified restrictions of Dr. Black, the fact that the restrictions of both Dr. Black and Dr. Koprivica were based largely upon the claimant's subjective complaints, considering the claimant's lack of credibility, her unwillingness to participate in the recommended work hardening programs, and her unwillingness to attempt the dietary aide position, the Appeals Board finds that claimant has not sustained her burden of proving a work disability in excess of the five percent functional rating given by Dr. Koprivica. Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

AWARD

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tammie G. Foulk, and against the respondent, Colonial Terrace Nursing Home, and the insurance carrier, National Union Fire Insurance Company, for a five percent (5%) permanent partial general body disability from an accidental injury sustained on August 22, 1991.

The claimant is entitled to 33 weeks temporary total disability at the rate of $128.56 per week or $4,242.48 followed by 382 weeks at $6.43 per week or $2,456.26 for a five percent permanent partial general body disability making a total award of $6,698.74.

As of January 14, 1994, there would be due and owing to the claimant 33 weeks temporary total compensation at $128.56 per week in the sum $4,242.48 plus 92.29 weeks permanent partial compensation at $6.43 per week in the sum of $593.43 for a total due and owing of $4,835.91 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of $1,862.84 shall be paid at $6.43 per week for 289.71 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

TODD REPORTING	
Transcript of Regular Hearing by Deposition	$ 238.00
GENE DOLGINOFF ASSOCIATED, LTD.	
Deposition of P. Brent Koprivica, M.D.	$ 228.80
COURT REPORTING SERVICE	
Deposition of Karen Crist Terrill	$ 163.30
Deposition of Ely Bartal, M.D.	$ 114.20
IRELAND COURT REPORTING	
Deposition of Jerry D. Hardin	$ 247.40
HEATHER A. LOHMEYER, C.S.R.	
Deposition of David L. Black, M.D.	Unknown
Deposition of Robert D. Keal	Unknown
DEBRA D. OAKLEAF, C.S.R.	
Deposition of Rosemary Standiferd	$ 172.00

IT IS SO ORDERED.

Dated this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Lawrence M. Gurney, 1861 North Rock Road, Wichita, Kansas 67206
M. Doug Bell, P.O. Box 9, Coffeyville, Kansas 67337
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director